RECEIVED by MSC 9/6/2017 9:17:22 PM

No. 155245

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

ELISAH KYLE THOMAS,
Defendant-Appellant.

On Appeal from the Michigan Court of Appeals, No. 326311
Wayne Circuit Court No. 14-009512-01-FC

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

NATHALIE F.P. GILFOYLE
DEANNE M. OTTAVIANO
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 1st Street N.E.
Washington, D.C. 20002
(202) 336-5500

DAVID W. OGDEN
DANIEL S. VOLCHOK
DEREK WOODMAN (P79205)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

September 6, 2017

RECEIVED by MSC 9/6/2017 9:17:22 PM

TABLE OF CONTENTS

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

INTEREST OF AMICUS CURIAE

The American Psychological Association is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, APA has approximately 115,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's purposes are to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns.

APA has filed more than 170 amicus briefs in cases around the country, briefs that courts have cited frequently. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 1994-1995, 2000-2001 (2014); *Commonwealth v. Wright*, 14 A.3d 798, 816 n.16 (Pa. 2011). These briefs have often addressed eyewitness-identification issues. *See, e.g.*, *Perry v. New Hampshire*, 565 U.S. 228 (2012); *Payne v. Commonwealth*, 794 S.E.2d 577 (Va. 2016); *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015); *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014); *State v. Artis*, 101 A.3d 915 (Conn. 2014).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether a case is one in which there is sufficient scientific research relevant to a question before the court that APA can usefully contribute to the court's resolution of that question. APA regards this as one of

RECEIVED by MSC 9/6/2017 9:17:22 PM

those cases: Over a dissent, the court of appeals reversed the trial court's ruling that due process barred the admission at trial of the victim's initial identification of his assailant, an identification that involved police showing the victim a single photograph (of the defendant). The trial court also held that the victim's in-court identification of the defendant was likewise inadmissible, because it was tainted by the earlier single-photograph identification. There is substantial social-science research bearing on these rulings, research regarding the reliability—and limitations—of eyewitness identifications under a variety of circumstances.

INTRODUCTION

Eyewitness testimony is a critical part of the criminal-justice system's truth-seeking process. Accurate eyewitness identifications can provide key evidence of guilt or innocence. But "both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identifications." Devenport et al., *Eyewitness Identification Evidence*, 3 Psychol. Pub. Pol'y & L. 338, 338 (1997). Indeed, "eyewitness [m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." *State v. Henderson*, 27 A.3d 872, 885 (N.J. 2011) (quotation marks omitted); *accord State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005) (citing Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Hum. Behav. 603 (1998)). Misidentification thus "present[s] what is conceivably the

RECEIVED by MSC 9/6/2017 9:17:22 PM

greatest single threat to the achievement of our ideal that no innocent [person] shall be punished." *Henderson*, 27 A.3d at 885.

These are not new insights. Decades ago, for example, the U.S. Supreme Court noted that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

Recent times have, however, brought significant new data to support the conclusion that erroneous eyewitness identifications lead to innocent people being convicted and imprisoned. According to the Innocence Project, for instance, over 70 percent of DNA exonerations involve eyewitness misidentification. *See Eyewitness Identification and Facts on Post-Conviction DNA Exonerations*, www.innocenceproject.org/dna-exonerations-in-the-united-states/ (visited Sept. 6, 2017). Another study similarly found that, of the first 200 cases of post-conviction DNA exonerations, nearly 80 percent included at least one eyewitness who mistakenly identified the innocent defendant. *See* Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 tbl. 2 (2008). Overall, inaccurate eyewitness identifications are believed to account for more than half of wrongful convictions in the United States. *See* Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 Res. in

RECEIVED by MSC 9/6/2017 9:17:22 PM

Soc. Probs. & Pub. Pol'y 99, 101-103 (1987) (stating that a study implicated mistaken eyewitness identifications as the cause of more than 60 percent of the five hundred wrongful convictions studied); Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 3-36 (1995).

One important reason for these wrongful convictions is that although the unreliability of eyewitness identifications is well known in the scientific community and among many lawyers, it is not generally understood by lay juries. To the contrary, empirical research has shown that juries greatly overestimate the accuracy of eyewitness identifications. As another state supreme court observed, "there is almost nothing more convincing" to a jury than an eyewitness's identification of the defendant. *Henderson*, 27 A.3d at 889. In one study, nearly 84 percent of respondents overestimated the accuracy rates of identifications. Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 L. & Hum. Behav. 19, 22-24 (1983). And another controlled study found that the conviction rate by mock juries increased from 49 percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary. Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002).

In considering the issues presented here, APA submits that this Court should take account of the extensive body of psychological research dedicated to

RECEIVED by MSC 9/6/2017 9:17:22 PM

eyewitness identifications. That research supports the adoption of a presumption that eyewitness identifications that are based on the eyewitness's exposure to a single photograph of a suspect (as here) are presumptively unreliable and hence presumptively inadmissible. But whether or not such a presumption is adopted, the research supports the conclusion of the trial court and the court of appeals dissent that the eyewitness identifications here were too unreliable to be admitted under the Due Process Clause.

ARGUMENT

I. THIS COURT SHOULD ADOPT A PRESUMPTION THAT THE ADMISSION OF SINGLE-PHOTOGRAPH IDENTIFICATIONS VIOLATES DUE PROCESS

The U.S. Supreme Court has held that the admission into evidence of an eyewitness identification violates due process if the identification is procured through a procedure suggestive enough to "give rise to a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 238 (2012). And as this Court has noted, showing a single photograph of a suspect to an eyewitness "is one of the most suggestive photographic identification procedures that can be used." *People v. Gray*, 457 Mich. 107, 111 (1998). That conclusion is supported by decades of research in psychological science, which explains that single-photograph identifications are uniquely prejudicial because they not only implicitly suggest that the person pictured is under police investigation but also do so—unlike in a traditional "lineup" or photo array—

RECEIVED by MSC 9/6/2017 9:17:22 PM

without the crucial safeguard of alternative selections ("foils" or "fillers") for the witness to choose.

To minimize the risk of wrongful convictions arising from the use of single-photograph and similarly unreliable methods of identification, some courts have established a presumption against the admission of eyewitness identifications obtained under inherently suggestive circumstances. The Wisconsin Supreme Court, for example, has held that "evidence obtained from an out-of-court showup," a procedure akin to a single-photograph identification, "is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." *State v. Dubose*, 699 N.W.2d 582, 593-594 (Wis. 2005); *accord Commonwealth v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014); *People v. Adams*, 423 N.E.2d 379, 384 (N.Y. 1981). This Court should do likewise here.

A. In Part Because Of The Nature Of Human Memory, Eyewitness Identifications Are Prone To Error

As explained, eyewitness identifications are frequently mistaken. In fact, studies indicate that approximately one-third of such identifications are inaccurate. In one study, for example, out of 717 six-person photospreads, 32 percent correctly identified the suspect, 29 percent incorrectly identified a "filler," and 39 percent made no identification. *See* Wixted et al., *Estimating the reliability of eyewitness identifications from police lineups*, Proceedings of the Nat'l Acad. of Sci., 113,

RECEIVED by MSC 9/6/2017 9:17:22 PM

304-309 (2016). Other studies have found similar error rates. *See* Behrman & Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 L. & Hum. Behav. 475, 480-482 (2001) (32.4 percent inaccuracy rate); Wright & Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 Psychol. Sci. 172, 175 (2007) (26.6 percent); Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 10-14 (1995) (35.8 percent).

Decades of social-science research on human memory offer insights into the reasons for mistaken identifications. Cognitive psychologists have long "established that when we experience an important event, we do not simply record it in our memory as a videotape recorder would." Loftus et al., *Eyewitness Testimony: Civil & Criminal* §2-2, at 14 (5th ed. 2013). Rather, the process of remembering is—as explained in a seminal work on the subject—"an imaginative reconstruction or construction…. It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]" Bartlett, *Remembering* 213 (reprint 1964) (1937). Errors are common because "what is perceived and stored in memory is often incomplete or distorted as a result of the individual's state of mind or the nature of the event observed." Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 Ct. Rev. 12, 13 (1999).

RECEIVED by MSC 9/6/2017 9:17:22 PM

In particular, psychological research has documented that memory involves three discrete stages: (1) the acquisition or encoding stage, when a witness perceives an event and information is entered into the memory system; (2) the retention or storage stage, which is the period between acquisition and the witness's attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. Loftus et al., *Eyewitness Testimony* §2-2, at 14. Many factors may adversely affect memory at each stage. For example, during the acquisition phase, memory can be influenced by the short duration of an event; during the retention stage, the passage of time may contaminate the witness's memory; and, at the retrieval stage, the method of questioning may adversely affect a witness's recall. *Id.* at 15. Given these numerous ways in which memory can be unreliable, it is unsurprising that eyewitness identifications are often inaccurate.

B. Single-Suspect Identifications Are Inherently Suggestive And Unreliable

Social-science research has grouped the factors that affect memory retrieval into two broad categories: system variables and estimator variables. *See* Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. Pub. Int. 45, 47 (2006) (citing Wells, *Applied Eyewitness Testimony Research*, 36 J. Personality & Soc. Psychol. 1546 (1978)). Estimator variables are those that cannot be changed, such as dim lighting and the witness's distance from the

RECEIVED by MSC 9/6/2017 9:17:22 PM

perpetrator at the time of a crime. System variables, by contrast, are those within the control of law enforcement, such as the method of interviewing eyewitnesses. *Id.* at 47, 54-55. Research shows that both types of variables can have a "strong impact on the resulting probative value of eyewitness testimony." Wells et al., *Eyewitness Evidence*, at 46; *accord* Kaplan & Puracal, *Who Could It Be Now? Challenging the Reliability of First Time In-Court Identifications After* State v. Henderson *and* State v. Lawson, 105 J. Crim. L. & Criminology 947, 964 (2015).

Perhaps the most important system variable is the method through which an eyewitness identification is made. For example (and of particular relevance here), any identification procedure in which police show a witness only a single suspect carries significant risk of error. That is because in such circumstances, "the identity of the police suspect is obvious." Loftus et al., *Eyewitness Testimony* §4-7, at 91. Unlike in a lineup or photo array, the witness's task is not to identify the perpetrator from a group of people matching a given description, but rather to confirm law enforcement's suspicion that the individual whom police have singled out is the culprit. That is inherently suggestive.

Single-suspect identifications, moreover, provide no filter for "guess" identifications, i.e., identifications by eyewitnesses who do not recognize the perpetrator but who, seeking to be helpful, nonetheless make an identification. With lineups and photo arrays, guesses frequently result, as a matter of simple

RECEIVED by MSC 9/6/2017 9:17:22 PM

probabilities, in the selection of a "filler" whom police know is not the perpetrator. Loftus et al., *Eyewitness Testimony* §4-7, at 87. This safety valve disappears, however, if a witness is given just one option, as with a single-photograph identification. *See* Nat'l Research Council of the Nat'l Acads., *Identifying the Culprit: Assessing Eyewitness Identification* 36 n.28 (2014).

Courts have long recognized that these factors make single-suspect identifications suggestive and hence conducive to false identifications. Fifty years ago, the U.S. Supreme Court observed that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). Indeed, "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *United States v. Wade*, 388 U.S. 218, 234 (1967). This Court has similarly recognized that "the exhibition of a single photograph is one of the most suggestive photographic identification procedures that can be used." *Gray*, 457 Mich. at 111 (quotation marks omitted); *see also People v. Anderson*, 389 Mich. 155, 186 (1973).

Psychological research confirms this judicial skepticism, demonstrating empirically that single-suspect identifications are much more likely to produce misidentifications than other procedures. For example, in one analysis that combined existing studies—known as a "meta-analysis"—researchers found that

RECEIVED by MSC 9/6/2017 9:17:22 PM

live single-suspect identifications (known as "showups") produced more than twice as many false identifications as multi-person lineups. *See* Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & Hum. Behav. 523, 532-533 (2003); *accord* Dysart & Lindsay, *Show-Up Identifications*, *in* 2 Handbook of Eyewitness Psychology 137, 141 (Lindsay et al. eds., 2007).

A second, more recent meta-analysis echoes those findings, concluding that research "provide[s] a dismal portrayal of" showups, and that researchers "have yet to find a situation where it would be more appropriate to conduct a showup [than a lineup] if eyewitness accuracy is the primary goal." Neuschatz et al., *A Comprehensive Evaluation of Showups*, *in* 1 Advances in Psychology and Law 43, 63 (Miller & Bornstein eds., 2016). Even worse, single-suspect identifications tend not only to be less reliable but also to inflate eyewitness confidence, which can be very persuasive to jurors—leading to "the most dangerous" combination of identifications that are overconfident yet less accurate. *Id.* at 65-66.

C. A Single-Photograph Identification Is The Most Unreliable Form Of Single-Suspect Identification

While all single-suspect identifications are, as just explained, likely to produce misidentifications, single-*photograph* identifications are even more likely to do so than other single-suspect identifications. As the U.S. Supreme Court has explained, "because of the inherent limitations of photography, which presents its

RECEIVED by MSC 9/6/2017 9:17:22 PM

subject in two dimensions rather than the three dimensions of reality, … a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification." *United States. v. Ash*, 413 U.S. 300, 332-333 (1973). Courts have therefore long held that "a corporeal identification … is normally more accurate" than a photographic one. *Simmons v. United States*, 390 U.S. 377, 384, 386 n.6 (1968).

Indeed, this Court has explicitly recognized "that eyewitness identification through photographs is at least as hazardous as corporeal identification and probably is more hazardous to the securing of correct identifications." *Anderson*, 389 Mich. at 186. As a result, the law of this state is that "[s]ubject to certain exceptions, identification by photograph should not be used where the accused is in custody" and a live presentation to the witness is possible. *Id.* at 186-187.

The social-psychology literature has addressed this topic as well. As one recent study observed, "live lineups provide witnesses with more information than photo lineups." Clark et al., *Eyewitness Identification and the Accuracy of the Criminal Justice System*, 2 Pol. Insights from the Behav. and Brain Sci. 175, 180 (2015). A meta-analysis supports that observation, showing "a reduction in the false identification rate *and* an increase in the correct identification rate for lineups that provided witnesses with more information (voice information, movement, whole-body information) relative to lineups that provided witnesses with less

RECEIVED by MSC 9/6/2017 9:17:22 PM

information (no voice information, no movement, head-and-shoulders photographs only)." Clark et al., *Lineup Composition and Lineup Fairness*, in *Forensic Facial Identification: Theory and Practice of Identification from Eyewitnesses, Composites and CCTV* 152 (Valentine & Davis. eds., 1st ed. 2015).[1]

D. A Presumption Against The Admissibility Of Single-Photograph Identification Is Consistent With This Court's Cases And Would Deter Undesirable Practices

In light of the very high risk of misidentification with single-photograph identifications, this Court should adopt a presumption against their admission. As noted, several other state supreme courts have approved a presumption against the admissibility of inherently suggestive identifications. *See Dubose*, 699 N.W.2d at 593-594, *quoted supra* p.6; *Crayton*, 21 N.E.3d at 169 ("[W]e shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is good reason for its admission." (quotation marks omitted)); *Adams*,

---

[1] Some earlier studies found that live *lineups* and photo arrays have roughly similar rates of accuracy. *See, e.g.*, Cutler & Fisher, *Live Lineups, Videotaped Lineups and Photoarrays*, 3 *Forensic Reports*, 439-448 (1990). This is in large part because a suspect in a live presentation—whether guilty or innocent—sometimes engages in anxious behavior, which increases the probability that a witness will identify him as the culprit from among a line-up of "foils." Weigold, & Wentura, *Who's the one in trouble? Experimental evidence for 'psychic state' bias in lineups*, 34 Eur. J. of Soc. Psychol., 121-133 (2004). This effect is much less pronounced in a showup, where there are no alternative choices for a witness to identify. Thus, even if lineups and photo arrays lead to a similar number of misidentifications, it is likely a single-photograph identification will be less reliable than a showup.

RECEIVED by MSC 9/6/2017 9:17:22 PM

423 N.E.2d at 384 (holding that exclusion is warranted when an identification is unnecessarily "made under inherently suggestive circumstances"). Under these cases, identifications obtained through inherently suggestive methods are deemed inadmissible absent a showing of necessity or good cause—for example, when a witness might die before a more reliable identification process can be used, or when there is a demonstrable risk to public safety in waiting to use an alternative identification procedure.

Adopting a similar presumption against the admission of single-photograph identifications would be consistent with this Court's prior cases. For example, in *People v. Lee*, 391 Mich. 618 (1974), the Court noted that while "[t]he fairness of an identification procedure must be evaluated in the light of the totality of the circumstances," the appropriate "test is the degree of suggestion *inherent in the manner* in which the suspect's photograph is presented to the witness for identification," *id.* at 626 (emphasis added). When a manner of presentation is so "suggestive that it gives rise to a substantial likelihood of misidentification," the eyewitness testimony must be excluded. *Gray*, 457 Mich. at 111.

Of course, "a suggestive lineup is not necessarily a constitutionally defective one"; for an identification to be inadmissible, suggestiveness must also give rise to a "substantial likelihood of misidentification." *People v. Kurylczyk*, 443 Mich. 289, 306 (1993). As this Court recognized in *Gray*, however, a single-photograph

identification procedure *invariably* gives rise to such a likelihood. *Gray* therefore held that it violated due process to admit an identification where "[t]he defendant was singled out by showing only one photo to the victim." 457 Mich. at 111. Indeed, the Court concluded that the suggestiveness of the single-photo procedure was so strong that the identification was inadmissible even though—unlike here—it occurred *after* an earlier non-suggestive identification. *See id.* at 112.

Further confirmation that *Gray* (correctly) saw single-photograph procedures as inherently too suggestive is the fact that the Court referred to "a substantial likelihood of misidentification" without any inquiry into other circumstances bearing on reliability. 457 Mich. at 114. Only in addressing the separate question of whether the impermissible identification tainted the later in-court identification did the Court consider factors extrinsic to the identification method itself. *See id.* at 114-115 ("Our inquiry does not end once we have found an invalid identification procedure. The second step in our analysis is to determine whether the victim had an independent basis to identify the defendant in court…. The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the 'totality of the circumstances.'").

Similar to *Gray* and *Lee*, this Court emphasized in *People v. Hallaway*, 389 Mich. 265 (1973), that eyewitness testimony is inadmissible if it was obtained in a manner that was "unnecessarily suggestive and conducive to irreparable mistaken

RECEIVED by MSC 9/6/2017 9:17:22 PM

RECEIVED by MSC 9/6/2017 9:17:22 PM

identification," *id.* at 284. The Court further held that admission of such testimony was permissible despite the suggestiveness only if there is "an imperative circumstance warranting an admittedly suggestive showup"—such as "the critical condition of the victim." *Id.* The Court found this exception met in that case because the charred remnants of documents stolen in the robbery were found in the defendant's car, thus showing "an attempt to destroy evidence." *Id.*

In sum, this Court's cases already reflect the conclusion that eyewitness testimony based on a procedure that inherently carries a "substantial likelihood of misidentification"—such as a single-photograph procedure—is inadmissible absent the type of "necessity" present in cases like *Hallaway*. The Court should explicitly announce and adopt that presumption.

Such a presumption also comports with the "deterrence rationale" of the due process exclusionary rule. *Perry v. New Hampshire*, 565 U.S. 228, 242 (2012). "A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances," the U.S. Supreme Court has explained, "is to deter law enforcement use of improper" identification procedures. *Id.* at 241. Such deterrence is particularly important with photographic identifications. Unlike an in-person identification, where the suspect is typically in custody and probable cause to arrest has been established, a single-photograph identification will often happen as a *substitute* for the police-work required to establish probable cause. As

RECEIVED by MSC 9/6/2017 9:17:22 PM

social-science evidence has shown, police are usually inclined to notice confirmatory evidence of a suspect's guilt, while disregarding evidence inconsistent with their intuitions. *See* O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 Psychol. Pub. Pol'y & L. 315-334 (2009). Hence, there is a natural tendency for police to suspect individuals who fit a general criminal profile. If officers act on this impulse by photographing such individuals and using those photographs to establish probable cause through (unreliable) identifications, there is a significant risk that innocent people will be falsely accused and convicted.

This case illustrates that danger. The only identifying information Officer Howell had when she arrived at the crime scene was a description "that the assailant was dark-skinned, was about the victim's own size, being 5 feet 9 inches tall and about 145 pounds, and had been wearing a black hood." *People v. Thomas*, 2016 Mich. App. LEXIS 2248, at *2 (Dec. 8, 2016) (per curiam) On the basis of this description—which the court of appeals acknowledged "could apply to many people," *id.* at *10—she stopped and searched the defendant, who was "near a gas station across the street from the scene of the shooting." *Id.* at *2. Finding no weapon or outstanding warrants, Officer Howell concluded that she lacked probable cause to arrest. *Id.* at *3. She nonetheless took a photo of the defendant with her cellphone and showed it to the victim at the hospital—asking

RECEIVED by MSC 9/6/2017 9:17:22 PM

"was this him?" *Id.* at *3 & n.1. In short, a police officer with no firm basis to believe a bystander was the perpetrator nonetheless had an incentive to take a photo of the bystander and present it to a witness to "confirm" the officer's intuitions. Establishing a presumption against the admissibility of single-photograph identifications is essential to curtailing such improper practices.

II. IRRESPECTIVE OF ANY PRESUMPTION, THE SINGLE-PHOTOGRAPH IDENTIFICATION HERE WAS TOO UNRELIABLE TO BE ADMITTED

Even if this Court declines to adopt a presumption that single-photograph identifications are inadmissible, the trial court correctly held that the photograph-based identification here was unreliable under the totality of the circumstances.

A. Social-Science Research Indicates That Various Factors Made The Victim's Identification Particularly Suspect

As discussed, humans' memory retrieval is influenced by both system and estimator variables. The primary (overriding) system variable here was the highly suggestive single-photograph identification. But there were also several estimator variables that call the reliability of the victim's identification into question.

1. The victim observed his assailant for a very short time

Studies have demonstrated that the reliability of an eyewitness identification significantly diminishes when the witness sees the perpetrator for a short time. One study, for example, found an accuracy rate of 85 to 95 percent when subjects were exposed for forty-five seconds to the image of the perpetrator during a

RECEIVED by MSC 9/6/2017 9:17:22 PM

videotaped reconstruction of robbery, and a subsequent photo array contained the perpetrator. But that rate fell to between 29 and 35 percent when the exposure lasted only twelve seconds. *See* Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 British J. Psychol. 339, 345 tbl. 1 (2003); *see also* Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 140, 150 (1986) (finding a significant correlation between exposure duration and accuracy based on a meta-analysis of 128 existing studies involving nearly 17,000 subjects). Here, the victim viewed his assailant for four seconds while the two crossed in the street, and then for at most seven seconds during the crime. *See Thomas*, 2016 Mich. App. LEXIS 2248, at *8-9. Under the research just cited, that significantly weakens the reliability of the identification.

The court of appeals reached the contrary conclusion by subtly shifting the relevant standard. The court first noted (correctly) that the relevant question is "whether the victim … had a *sufficient* opportunity to view the assailant." *Thomas*, 2016 Mich. App. LEXIS 2248, at *8 (emphasis added). Yet the court concluded that this factor weighed in favor of reliability (despite a discrepancy in the victim's description of his assailant) because "the victim indisputably had *the* opportunity to observe the assailant, if only for a short time." *Id.* at *9 (emphasis added). But if having *any* opportunity to observe a perpetrator were sufficient, this factor would favor reliability in virtually every case. That is not the law. The court's subtle

RECEIVED by MSC 9/6/2017 9:17:22 PM

shift underscores that the duration-of-time factor actually undermines reliability here.

2. The victim had only a partial view of the defendant's facial features

Research confirms the unsurprising proposition that a distorted or obstructed view of a person's face can have a dramatic effect on the level of accuracy in recognizing and recalling that face. *See* Cutler et al., *Improving the reliability of eyewitness identification: Putting context into context*, 72 J. Applied Psychol. 629-637 (1987); Cutler et al., *The reliability of eyewitness identification: The role of system and estimator variables*, 11 L. & Hum. Behav. 233-258 (1987). Here the assailant was wearing a hood, "obscuring the assailant's hair but not his face." *Thomas*, 2016 Mich. App. LEXIS 2248, at *4; *see also id.* at *18 (Shapiro, J., dissenting) ("Because of the hood, [the victim] stated that he was only able to see the man's face from eyebrows to chin and could not see the man's hair or ears."). That partial view reduces the reliability of the resulting identification.

3. The assailant was a stranger to the victim

Social-science research confirms the (again unsurprising) fact that people are significantly less likely to recognize and recall faces that are not familiar to them. *See*, *e.g.*, Burton et al., *Face Recognition in Poor-Quality Video: Evidence from Security Surveillance*, 10 Psychol. Sci. 243-248 (1999). Here, the assailant was a

RECEIVED by MSC 9/6/2017 9:17:22 PM

complete stranger to the victim. The victim's recollection of the assailant is thus likely to be notably less reliable than if the assailant were a familiar person.

4. The robbery was a highly stressful situation

The level of stress experienced by an eyewitness during exposure to an assailant can also affect the reliability of a subsequent identification. One meta-analysis found "clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy." Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & Hum. Behav. 687, 694 (2004) (analyzing 27 studies). Another study, involving participants at military-survival schools who were exposed to genuine stress, similarly found "robust evidence that eyewitness memory for persons encountered during events that are … highly stressful[] … may be subject to substantial error." Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265, 274 (2004). While witnessing any crime is to some degree stressful, being the victim of a robbery involving a deadly weapon is a particularly high-stress witness encounter. That heightened level of stress likely had a significant adverse effect on the victim's memory here.

RECEIVED by MSC 9/6/2017 9:17:22 PM

B. The Court Of Appeals Gave Weight To Factors That Do Not Support A Finding Of Reliability

In support of its conclusion that the eyewitness identification here was reliable notwithstanding the highly suggestive technique used and the estimator variables just discussed, the court of appeals majority placed weight on factors that, in its view, suggested reliability. Empirical research demonstrates, however, that each of the factors is of little if any probative value as to reliability.

1. The victim's detailed memory of the assailant's weapon makes his memory less *reliable, not more*

As a factor weighing in favor of reliability, the court of appeals noted that the victim remembered both that the assailant's weapon was "a black and gray nine millimeter handgun and that the assailant held it in his right hand." *Thomas*, 2016 Mich. App. LEXIS 2248, at *4; *see id.* at *9. That highly specific recollection (far more detailed than the victim's description of the assailant) actually indicates the memory-*distorting* effect of what is known as "weapon focus."

Weapon focus "refers to the visual attention eyewitnesses give to a perpetrator's weapon during the course of a crime"—attention that can "reduce his or her ability to later recall details about the perpetrator or to recognize the perpetrator." Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 53 (2006). Several studies, including a meta-analysis, have found that weapon focus has a statistically significant adverse impact on

RECEIVED by MSC 9/6/2017 9:17:22 PM

eyewitness accuracy. *See* Fawcett et al., *Of guns and geese: A meta-analytic review of the 'weapon focus' literature*, 19 Psychol., Crime & L. 35-66 (2013); Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & Hum. Behav. 413, 420 (1992); O'Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 L. & Hum. Behav. 385, 392 (1989). The fact that the victim here initially remembered few distinctive features of his assailant, but immediately recalled the nature of the weapon and the hand in which it was held, is a strong sign that his perception was affected by weapon-focus, thus undermining the overall reliability of his identification.

2. Memories degrade very quickly

The court of appeals also believed that a factor favoring reliability was that the "the identification occurred approximately a half hour to an hour after the crime." *Thomas*, 2016 Mich. App. 2248, at *10. This belief is inconsistent with the reality of how quickly the quality of a person's memories degrade. Human memory's "decay function is not linear; rather, greater decay occurs early on and the rate of decay lessens over time." Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 336 (2006); *see also* Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's*

RECEIVED by MSC 9/6/2017 9:17:22 PM

Memory Representation, 14 J. Experimental Psychol.: Applied 139-150 (2008). Even a gap of half an hour between exposure and identification, therefore, can significantly affect the reliability of an identification. *See* Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & Hum. Behav. 459, 469 (1996) (finding that showups performed 30 minutes after a crime "are likely to be unreliable."). While the gap here was of course preferable to one lasting days or weeks, the court of appeals placed undue weight on this factor and failed to appreciate how quickly memories can fade or become distorted during the retention phase.

3. The victim's confidence does not indicate that his memory was accurate

The court of appeals also gave weight to the fact that "the victim identified the person in the photograph as the assailant within a few seconds of seeing the photograph, which suggests some certainty." *Thomas*, 2016 Mich. App. 2248, at *10. But except in circumstances not present here, *see infra* n.2, the relationship between eyewitness confidence and eyewitness accuracy has been widely discredited by social-science research. As one report concluded, "[t]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence accuracy relationship for eyewitness identification is weak." Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification:*

RECEIVED by MSC 9/6/2017 9:17:22 PM

The Effects of Reflection and Disconfirmation on Correlation and Calibration, 8 J. Experimental Psychol. Applied 44, 44-45 (2002).[2]

Witnesses' confidence, moreover—like their memories of faces and events—is highly malleable, and thus may change based on new information received before or after an identification. *See* Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & Hum. Behav. 1, 11-12 (2009). Of particular relevance here, studies have found that suggestive identification procedures "reliably inflate[] witnesses' … confidence." Loftus et al., *Eyewitness Testimony* §3-12, at 70; *see also* Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45 (2006); Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374 (1998). Here, the victim's confidence appeared to increase significantly after the suggestive photo-identification procedure. This increase indicates how confidence

[2] Recent research suggests that eyewitness confidence can be strongly correlated with accuracy under "pristine testing conditions." Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. Pub. Int. 10, 10 (2017). A single-photograph identification, of course, does not remotely qualify as pristine conditions. And the recent research confirms that absent such conditions, "the accuracy of even a high confidence suspect ID is seriously compromised." *Id.*

RECEIVED by MSC 9/6/2017 9:17:22 PM

can be a function of the suggestiveness of an identification procedure rather than of the reliability of the witness's recollection.

III. SOCIAL-SCIENCE RESEARCH INDICATES THERE IS A STRONG RISK THAT THE VICTIM'S IN-COURT IDENTIFICATION WAS CONTAMINATED BY HIS EARLIER PHOTOGRAPH-BASED IDENTIFICATION

Courts have long recognized that exposing an eyewitness to a person's likeness increases the risk that the witness will misidentify that person as the culprit in the future. Over forty years ago, for example, the U.S. Supreme Court observed that, after seeing a photograph of a suspect, a "witness … is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Simmons*, 390 U.S. at 383-384 (citing Wall, *Eye-Witness Identification in Criminal Cases* 68-70 (1965)). This Court has similarly noted that "[i]n cases where the identification procedures employed are suggestive and conducive to irreparable misidentification … [those] procedures operate upon the unconscious recognition process of the witness and create a likelihood that there will be a misidentification" in a future identification. *Anderson*, 389 Mich. at 189. Other state high courts have reached the same conclusion. *See, e.g.*, *State v. Lawson*, 291 P.3d 673, 687 (Or. 2012) ("Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the

RECEIVED by MSC 9/6/2017 9:17:22 PM

suspect's face" in subsequent identification); *State v. Artis*, 101 A.3d 915, 922-923 (Conn. 2014) (similar).

These conclusions are supported by research, which shows that the presentation of a suspect in one identification procedure contaminates any selection of that suspect by the same witness in a subsequent identification procedure. In particular, the identification of a suspect from the subsequent procedure may represent a "source-monitoring error." *See* Johnson et al., *Source Monitoring*, 11 Psychol. Bulletin 1, 11-12 (1993). Source monitoring refers to the process of making attributions about our memories, and source-monitoring errors refer to mistaken attributions about our memories. In a subsequent identification procedure, therefore, a witness may incorrectly attribute the source of her memory to having viewed the actual perpetrator during the crime, rather than having seen the suspect in the prior identification test. And there is no way to know whether the identification of the suspect in the later procedure is a product of the witness's original memory of the assailant, or instead reflects the witness's familiarity with the suspect from the prior procedure.

Psychological research has documented source-monitoring errors. For example, one meta-analysis that synthesized 15 previous studies found that eye-witnesses to simulated crimes who were exposed to photographs of suspects before participating in a lineup were significantly more likely to mistakenly identify as the

RECEIVED by MSC 9/6/2017 9:17:22 PM

culprit someone whom they had seen in a photograph, compared to those who participated in the lineup without first viewing the photographs. *See* Deffenbacher et al., *Mugshot Exposure Effects*, 30 L. & Hum. Behav. 287, 299 (2006). Overall, the presentation of photographs prior to the lineups reduced the proportion of correct identifications from 50 percent to 43 percent. *See id.* at 296; *see also* Brown et al., *Memory for Faces and the Circumstances of Encounter*, 62 J. Applied Psychol. 311, 313 (1977). Another study found that among witnesses shown a photo array including a prior erroneous choice, nearly 70% stayed with their erroneous choice, and only 8% shifted to the actual perpetrator. *See* Goodsell et al., *Investigating mug shot commitment*, 21 Psychol., Crime & L, 219, 226 (2015). Research thus supports the conclusion that participation in a photograph-identification procedure increases the likelihood that the witness will later mistakenly identify as the culprit someone seen in the photograph.

Here, the trial court held that the prosecution failed to meet its burden of showing by "clear and convincing evidence that the in-court identification has a basis independent of the prior identification procedure." *Gray*, 457 Mich. at 115. For the reasons discussed in the previous section in connection with the photo identification, the in-court identification bore several indicia of unreliability. Under this Court's precedent, these same factors counsel against a finding that the in-court identification here had an independent basis. *See id.* (noting the "eight

RECEIVED by MSC 9/6/2017 9:17:22 PM

[reliability] factors that a court should use in determining if an independent basis exists"). In particular, the assailant was a stranger with a partially obstructed face; the witness viewed him for a matter of seconds under high stress; and there were inconsistencies between the witness's immediate description and his subsequent (post-photograph) recollection. The trial court's conclusion that there was no clear and convincing evidence of an independent basis for the witness's in-court identification was therefore supported by psychological research.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: September 6, 2017

Respectfully submitted,

/s/ DEREK WOODMAN

NATHALIE F.P. GILFOYLE
DEANNE M. OTTAVIANO
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 1st Street N.E.
Washington, D.C. 20002
(202) 336-5500

DAVID W. OGDEN
DANIEL S. VOLCHOK
DEREK WOODMAN (P79205)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

CERTIFICATE OF SERVICE

On this 6th day of September, 2017, I filed the foregoing brief electronically using the Court's TrueFiling system, which will send copies by e-mail to all counsel of record.

/s/ Derek Woodman
DEREK WOODMAN

RECEIVED by MSC 9/6/2017 9:17:22 PM